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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALEJANDRO BOGARIN,

Defendant and Appellant.

G033297

(Super. Ct. No. 03CF1661)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald P. Kreber, Judge. Affirmed.

Harvey L. Goldhammer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Michael T. Murphy and Melissa A. Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

David Alejandro Bogarin challenges the sufficiency of the evidence supporting his conviction of corporal injury on a cohabitant and possession of methamphetamine for sale. We affirm.

STATEMENT OF FACTS

Bogarín began living with Claudia Tomaino in early January 2003. They initially shared a bedroom he rented in someone's house. The bedroom lacked a bed so the two of them slept together on the floor. After four months, they moved to Bogarín's parents' detached garage, where Bogarín and Tomaino slept together on a couch. Bogarín and Tomaino shared that living arrangement for two months, until the date of the violent incident involved in this case.

During the six months they lived together, Bogarín regularly supplied Tomaino with drugs for free, but she saw him sell drugs to others on numerous occasions. In late April or early May 2003, Bogarín attacked and hurt Tomaino in a fit of anger. She had found him smoking methamphetamine inside his parents' house and took the pipe from him, telling him she was going to smoke in the garage. Bogarín pushed Tomaino down to the floor and fell on her. He jammed his knee into her throat and punched her in the head. Then he slammed her head into the floor. Though hurt badly, she did not call the police.

Bogarín physically hurt Tomaino other times, as well. He also verbally abused her. Several times he ordered her to move out, but when she tried to leave, he would hold her and beg her to stay. When asked why she continued to live with Bogarín, rather than escape the abuse, Tomaino answered simply, "I cared for him a lot and he had asked me not to leave him alone."

On the afternoon of June 5, 2003, Tomaino, Bogarín, and his cousin J.D. were in the garage together. Tomaino got some grapes from the refrigerator and offered them to J.D. For some reason, this angered Bogarín and he began tossing small crystals of methamphetamine at Tomaino. She responded by tossing grapes at Bogarín, and accidentally hit him in the eye with one. Enraged, he charged at her and hit her between

the eyebrows with a closed fist. She fell to the ground and, just before losing consciousness, heard Bogarin tell J.D., “Just leave that bitch there and let’s go.”

Tomaino woke up and found blood running from her nose and down her forehead. Alone and in pain, she made her way to the couch and passed out again. Sometime later that night she woke up again and, with some difficulty, made her way on foot to a friend’s house. When Tomaino arrived, the friend observed “she was very beat up, . . . confused, dazed.” Tomaino’s “face was swollen, her eyes were black, and she had a cut above one of her eyes on her forehead.” Also “her eye inside was totally red.”

Tomaino stayed with that friend for several days, sleeping most of the time. She said she felt too groggy to report the incident to the police. On the fifth day after the attack, Tomaino finally called the police. Tomaino told the investigating officer that “her boyfriend had punched her in the face.” The officer observed Tomaino’s blackened eyes and a cut on her forehead. Tomaino not only named Bogarin as her attacker, but also reported that he sold drugs.

That evening three officers went to Bogarin’s parents’ home and found Bogarin in the garage with two other men. A patdown search of Bogarin yielded a bundle of methamphetamine, eventually determined to weigh 0.4 grams. On top of the pool table in the garage, officers found two small boxes, both of which contained drug paraphernalia. Some of the paraphernalia was consistent with drug use and some with drug sales (more about that later). Officers also found, in a mini freezer, a large amount (18.3 grams) of a crystallized substance that appeared to be methamphetamine but was later found to be a “cutting agent” for methamphetamine.

Bogarin was charged with corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)), possession of methamphetamine for sale (Health & Saf. Code, § 11378), and assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1).) The information also alleged as to the drug charge that Bogarin had three prior convictions within the meaning of Health and Safety Code section 11370.2,

subdivision (b), four prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (c), and one prior conviction within the meaning of Penal Code section 1203.07, subdivision (a)(11).

A jury convicted Bogarin of the three counts and he thereafter admitted all the prior conviction allegations. The court sentenced Bogarin to nine years in prison.

DISCUSSION

Bogarin’s only contention on appeal is that the evidence is insufficient to support his conviction of either corporal assault on a cohabitant or possession of methamphetamine for sale.

In considering a challenge to the sufficiency of the evidence, we “must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) As we explain below, we find the evidence sufficient to support Bogarin’s conviction of both the domestic violence battery and the drug offense.

Sufficiency of the Evidence of Cohabitation

Bogarin challenges his conviction of corporal injury on a cohabitant by arguing there is insufficient evidence he and Tomaino were cohabitants. The argument lacks merit.

The offense of corporal injury on a spouse or cohabitant is defined in Penal Code section 273.5. That statute makes it a felony for a person to willfully inflict “upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the

mother or father of his or her child, corporal injury resulting in a traumatic condition[.]” (Pen. Code, § 273.5, subd. (a).)

A finding of cohabitation under this statute “requires something more than a platonic, rooming-house arrangement.” (*People v. Holifield* (1988) 205 Cal.App.3d 993, 999.) “[C]ohabiting’ under section 273.5 means an unrelated man and woman living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy.” (*Id.* at p. 1000.)

Under this standard, the evidence easily supports the jury’s finding that Bogarin and Tomaino were cohabitants. They had lived together—sharing a couch or blankets on the floor—for six months, in two different locations. Tomaino testified they had kissed and had sexual relations “a few times” during the period they lived together. Bogarin regularly provided Tomaino with free drugs, and those drugs were apparently the mainstay of their relationship. Perhaps most telling, Tomaino endured Bogarin’s repeated beatings and emotional abuse because, as she put it, “I cared for him a lot and he had asked me not to leave him alone.”

In an attempt to refute this circumstantial evidence of cohabitation, Bogarin cites certain statements from Tomaino that suggest their relationship was more like a “platonic, rooming-house arrangement” than the sort of “substantial relationship” required for cohabitation under the statute. (*People v. Holifield, supra*, 205 Cal.App.3d at p. 1000.) For example, he points to Tomaino’s testimony she and Bogarin did not have a “truly” intimate relationship in June, the month the battery occurred, and her further assertion they were not “boyfriend /girlfriend.” He also relies on Tomaino’s testimony characterizing the nature of their relationship as “just drugs.”

Though the jury certainly could have relied on such evidence to find no cohabitation here, it did not. Instead, the jury obviously disregarded that testimony (as it was free to do) and credited, instead, the contrary evidence pointing to a substantial relationship between Tomaino and Bogarin. In addition to the already cited evidence of

their six-month shared domicile, occasional intimate relations, and mutual psychological dependence (reflecting the sadly typical domestic violence cycle of abuse/remorse/reconciliation/renewed abuse), we note Tomaino had described Bogarin as her boyfriend when she told a police officer about the battery. We conclude all this evidence adequately supports the jury's finding of cohabitation. (See *People v. Holifield*, *supra*, 205 Cal.App.3d at p. 1002 [sufficient evidence of cohabitation where defendant lived with victim in her motel room about half of the three months preceding the assault; they had infrequent sex, and the victim's unrequited "romantic feelings" for the defendant "show an intimacy going well beyond that of ordinary roommates"].)

Sufficiency of the Evidence of Intent to Sell

An essential element of the crime of possession for sale of a controlled substance is the specific intent to sell the drugs. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374; *In re Christopher B.* (1990) 219 Cal.App.3d 455, 466.) Bogarin contends the evidence does not support the finding he intended to sell the methamphetamine in his possession. We disagree.

"Intent to sell may be established by circumstantial evidence." (*People v. Harris*, *supra*, 83 Cal.App.4th at p. 374.) There is ample circumstantial evidence here of Bogarin's intent to sell. We start with Tomaino's testimony she saw him sell drugs to other people on numerous occasions. She also testified he commonly sold methamphetamine in small quantities, such as the "40"—a bindle holding four-tenths of a gram—police found in his pocket.

Also highly significant was Bogarin's possession of paraphernalia indicative of drug sales. One of the officers involved in the search of the garage, who has extensive experience in investigating narcotics crimes, explained the significance of the items found. He testified the officers opened a locked case and found three digital scales commonly used by drug dealers to weigh drugs for sale, and a large number of empty

plastic bindles (baggies), typically used to contain drugs sold to individual customers in small quantities such as a “20” (two-tenths of a gram) or “40” (four-tenths of a gram). Police also found in Bogarin’s freezer 18.3 grams of a “cutting agent” used by dealers to add weight to methamphetamine measured out for sale. The officer testified that, in his opinion, this physical evidence of drug dealing found at the scene indicated Bogarin intended to sell the bindle of methamphetamine found in his pocket.

““In cases involving possession of marijuana or [methamphetamine], experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual[.] [Citation.]’ Thereafter, it is for the jury to credit such opinion or reject it.” (*People v. Harris, supra*, 83 Cal.App.4th at pp. 374-375.)

Bogarin argues the evidence proves he possessed the methamphetamine for his own use, rather than for sale. He bases his argument, primarily, on the small quantity of drugs found on his person. He asserts a single “40”—four-tenths of a gram—of methamphetamine is more consistent with personal use, rather than drug sales. He also points to the searching officers’ discovery of a pipe and small butane torch used for smoking methamphetamine, and Q-tips usable for cleaning the pipe, as evidence he meant only to smoke the methamphetamine himself. Finally, Bogarin relies on the *absence* of two typical indicia of drug sales: cash and operable cell phones (he had neither with him).

Clearly, the record contains some evidence that would have supported a jury finding Bogarin lacked the intent to sell the drugs he possessed. However, the overwhelming weight of the evidence supports the contrary finding. For that reason, Bogarin’s challenge to the sufficiency of the evidence supporting the drug charge fails.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.